

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
TYRELL L. EILAND, :
Plaintiff, :
-v- : 10 Civ. 4131 (DLC)
:
U.S. DEPARTMENT OF EDUCATION et al., : MEMORANDUM OPINION
:
Defendants. : & ORDER
:
-----X

Appearances:

For Plaintiff:
Tyrrell L. Eiland, pro se
P.O. Box 20406
New York, NY 10023

For Defendants:
Cristine Irvin Phillips
United States Attorney's Office
Southern District of New York
86 Chambers Street, 3rd Floor
New York, NY 10007

DENISE COTE, District Judge:

The plaintiff Tyrrell L. Eiland ("Eiland"), proceeding pro se, brought an action against the United States Department of Education and two of its offices, the Office of the Ombudsman and the Office of Federal Student Aid (collectively, the "Department of Education"), for violating his constitutional rights by erroneously placing his federal student loan in default and by providing incorrect information to the national credit bureaus. The Court granted the Department of Education's motion to dismiss the complaint on January 4, 2011 (the "January 4 Opinion"). The

January 4 Opinion was filed on January 4, and mailed by chambers on that same day to Eiland at the address he had provided to the Court in his motion papers. The Clerk of Court separately mailed the notice of right to appeal and a copy of the Judgment to the same address on January 5. Neither mailing was returned to the Court as undeliverable.

On April 5, 2011, Eiland filed a motion for an extension of time to file a notice of appeal from the January 4 Opinion pursuant to Federal Rule of Appellate Procedure 4(a)(5). In his motion Eiland states that he failed to file the notice of appeal within the required 60 days because the Court mailed a copy of the January 4 Opinion to the wrong address; thus, Eiland claims that he never received notice of the January 4 Opinion.

Eiland's motion is denied because he failed to serve the motion on the Department of Education. "[A] party's failure to notice opposing counsel of a motion for extension filed after the expiration of the prescribed time deprives a district court of its authority to entertain the motion." Hamzi v. Minnesota Mut. Life Ins. Co., 196 F.3d 372, 373 (2d Cir. 1999). Attached to Eiland's motion was an affirmation of service showing that Eiland had served the Department of Education at the "U.S. Southern District Court Building" by the "U.S. Marshall." Service must be made on an attorney pursuant to Fed. R. Civ. P. 5(b)(1), however; Eiland's method of service was thus improper.

Moreover, Eiland has not shown that his failure to file the notice of appeal within the required 60 days was due to "excusable neglect or good cause" as required by Fed. R. App. P. 4(a)(5)(A)(ii). In determining whether there is "good cause" for the delay in filing an appeal, courts consider "(1) the danger of prejudice to the non-moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." In re Johns-Manville Corp., 476 F.3d 118, 124 n.6 (2d Cir. 2007) (citing Pioneer Investment Servs. Co. v. Brunswick Associates Ltd., 507 U.S. 380, 395 (1993)).

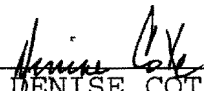
In this case the reason for the delay was entirely within the control of Eiland, who failed to notify the Court of any change of address. While Eiland asserts that his address is now P.O. Box 20406, New York, New York 10023, he does not indicate that he ever informed the Clerk of Court of the new address. Therefore, Eiland has not shown "good cause" for the delay, which could have been avoided had Eiland promptly notified the Court of his change of address.

In conclusion, Eiland's April 5, 2011 motion for an extension of time to file a notice of appeal is denied. In addition, the Court declines to issue a certificate of appealability. The Court finds pursuant to 28 U.S.C. §

1915(a)(3) that any appeal from this Order would not be taken in good faith. Coppedge v. United States, 369 U.S. 438, 445 (1962). The Clerk of Court shall close the case.

SO ORDERED:

Dated: New York, New York
May 5, 2011



DENISE COTE
United States District Judge

COPIES SENT TO:

Tyrrell L. Eiland
P.O. Box 20406
New York, NY 10023

Cristine Irvin Phillips
Assistant United States Attorney
U.S. Attorney's Office
86 Chambers Street, 3rd Floor
New York, NY 10007